

STATE OF MICHIGAN
COURT OF APPEALS

PRAMILA KOTHAWALA,

Plaintiff-Appellee,

v

MARGARET MCKINDLES,

Defendant-Appellant.

UNPUBLISHED

June 22, 2006

No. 262172

Oakland Circuit Court

LC No. 2004-058297-CZ

MARGARET MCKINDLES,

Plaintiff-Appellant,

v

PRAMILA KOTHAWALA,

Defendant-Appellee.

No. 262173

Oakland Circuit Court

LC No. 04-058212-CH

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant¹ appeals as of right from the trial court's amended opinion and order denying her motion for summary disposition in part² and granting plaintiff's motion for summary disposition. We affirm.

¹ For consistency purposes, Pramila Kothawala will be referred to as plaintiff, and Margaret McKindles will be referred to as defendant.

² The trial court granted the motion to the extent that plaintiff did not dispute that defendant was entitled to surplus funds.

This dispute involves a residence located at 3076 Cedar Crest Drive in Troy, Michigan. The mortgagors of the property were married couple Pinakini and Rajesh Kothawala. The couple obtained three mortgages on the property. On April 19, 2001, the couple obtained a mortgage valued at \$157,000 from First Federal of Michigan, d/b/a Charter One. The bank recorded this mortgage on August 1, 2001, with the Oakland County Register of Deeds. A second mortgage in the amount of \$10,000, also obtained from Charter One, on April 19, 2001, was recorded with the register of deeds on August 9, 2001. On August 27, 2001, the couple acquired a third mortgage from Standard Federal Bank in the amount of \$59,887.88.³ This mortgage was recorded on September 20, 2001. In early 2004, the couple defaulted on all three mortgages.

On March 30, 2004, Standard Federal Bank held a mortgage foreclosure sale with regard to the third junior mortgage. Defendant successfully bid \$52,053.63 to acquire the bank's rights to this junior mortgage. Defendant obtained a sheriff's deed on mortgage sale, which she recorded on April 7, 2004. A mortgage foreclosure sale was also held with regard to the senior mortgage on April 20, 2004. Plaintiff, the mother of property owner Rajesh Kothawala, successfully placed a bid of \$198,469.57 to purchase the senior mortgage interest. Although defendant was present at this sale, she did not bid on the property. There was a surplus of approximately \$39,500 because the bid exceeded the actual amount outstanding. Plaintiff obtained a sheriff's deed on mortgage sale that was recorded on April 27, 2004.

Within three days of the mortgage sale to plaintiff, defendant recorded an affidavit of abandonment that alleged that a notice of abandonment was posted on the property on March 30, 2004. On April 30, 2004, defaulted property owner Pinakini Kothawala arrived at the premises to find defendant and two men moving appliances from the home to the garage. She was denied entry to the home and contacted plaintiff regarding the activity that was occurring there. Consequently, two different actions were filed in circuit court. On May 10, 2004, defendant filed a petition to obtain the surplus amount of plaintiff's bid that exceeded the cost of the outstanding first mortgage. On May 13, 2004, plaintiff filed a complaint for declaratory relief and requested injunctive relief to preclude defendant's occupation of the premises and the removal of the personal property from the home. Ultimately, the possession of the premises was awarded to plaintiff. Defendant moved for limited access of the home to obtain an appraisal, alleging that she needed the appraisal to obtain the financing to redeem plaintiff's interest. The trial court denied defendant's motion for access to the home,⁴ and shortly thereafter the cases

³ The parties do not dispute that the first mortgage is the senior mortgage and characterize the two subsequent mortgages as "junior" to the first mortgage.

⁴ The first action requesting the surplus funds was filed by defendant and assigned to Judge Sosnick. The declaratory action was assigned to Judge Mester. When the action was transferred to Judge Sosnick, defendant alleged that Judge Mester rendered inconsistent decisions. Specifically, defendant alleged that it was erroneous for Judge Mester to rule that the affidavit of abandonment was proper, yet deny the request for access to obtain an appraisal. Defendant further represented that Judge Mester did not grant the motion because plaintiff would not agree to the appraisal. Defendant does not raise this same allegation on appeal. Indeed, review of the transcript reveals that Judge Mester did not rule based on plaintiff's objection. Rather, Judge

(continued...)

were consolidated. After a hearing on the parties' cross motions for summary disposition, the trial court ruled in favor of plaintiff's request for declaratory relief and denied defendant's request for an extension of the time to redeem the property. The trial court awarded defendant the surplus funds.

Defendant alleges that the trial court erred in granting summary disposition in favor of plaintiff because her affidavit of abandonment⁵ resulted in the reduction of the statutory redemption from a six-month period to thirty days. Therefore, after the expiration of the thirty-day period, defendant's equitable title became legal title that gave her a superior interest to plaintiff's sheriff's deed. We disagree.

Summary disposition decisions are reviewed de novo on appeal. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

MCL 600.3241a governs foreclosure of abandoned premises and provides:

(1) For purposes of this chapter, if foreclosure proceedings have been commenced under this chapter against residential property not exceeding 4 units and not more than 3 acres in size, abandonment of premises shall be conclusively presumed upon satisfaction of the following requirements:

(a) The mortgagee has made a personal inspection of the mortgaged premises and the inspection does not reveal that the mortgagor or persons claiming under the mortgagor are presently occupying or will occupy the premises.

(...continued)

Mester held that access for an appraisal was unnecessary in light of his preliminary conclusion that plaintiff held superior title to the property. Additionally, defendant alleged that Judge Sosnick criticized Judge Mester's ruling regarding the abandonment issue, but did not vacate the order. A circuit court is required to follow published decisions of the Court of Appeals and Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no requirement that one circuit court judge follow the decision of another. *Id.*

⁵ Plaintiff contends that she submitted objections to the language of the order regarding abandonment, but the order was erroneously entered. When the case was transferred to Judge Sosnick, the propriety of abandonment was questioned. We can resolve the case by assuming, without deciding, that defendant properly complied with the abandonment provisions such that the redemption period was reduced to 30 days.

(b) The mortgagee has posted a notice at the time of making the personal inspection and has mailed by certified mail, return receipt requested, a notice to the mortgagor at the mortgagor's last known address, which notice states that the mortgagee considers the premises abandoned and that the mortgagor will lose all rights of ownership 30 days after the foreclosure sale unless the mortgagor; the mortgagor's heirs, executor, or administrator; or a person lawfully claiming from or under 1 of them provides the notice required by subdivision (c).

(c) Within 15 days after receipt of a notice required by subdivision (b), the mortgagor; the mortgagor's heirs, executor, or administrator; or a person lawfully claiming from or under 1 of them does not give written notice by first-class mail to the mortgagee at an address provided by the mortgagee in the notices required by subdivision (b) stating that the premises are not abandoned.

(2) This section applies to a foreclosure proceeding filed or pending after May 15, 1986.

If property is abandoned, the redemption period is thirty days. MCL 600.3240(11). MCL 600.3236 addresses what transpires when the redemption does not occur within the applicable time period:

Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

The plain language of this statute provides that when the premises is not redeemed, the sheriff's deed becomes operative and vests in the grantee "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage ..." Review of the undisputed facts reveals that defendant purchased the third mortgage on the property. At the time this third mortgage was executed on the property, it was a junior mortgage to two other mortgages. Thus, defendant acquired the third mortgage interest to the property, an interest inferior to the senior mortgage issued by Charter One, the interest purchased by plaintiff at the mortgage foreclosure sale. Defendant avoids the language of this statute that limits the interest to that held "at the time of execution" of the mortgage. Rather, defendant essentially alleges that her interest is now elevated to the status of subrogee of the property owners and, therefore, she may redeem the property from plaintiff. However, the interest of the property owners would still be subject to the outstanding mortgages on the property, and the statute contains no language to indicate that defendant may stand in the shoes of the property owners with regard to the other mortgages and take their right of redemption.

Consistent with this position, case law interpreting MCL 600.3236 has concluded that “[a] purchaser at a foreclosure sale of a second mortgage takes the property subject to the first mortgage. ... The contrary is not true.” *Bd of Trustees of the General Retirement System v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318, 322; 377 NW2d 432 (1985). The *Bd of Trustees* Court examined the circumstance when a purchase of land is subject to a mortgage:

When a purchaser buys land subject to a mortgage (without assuming it), he does not become personally liable thereon, but nevertheless an equitable relation arises between himself and the original mortgagor. By virtue of having purchased subject to the mortgage, the land becomes the primary fund for the payment of the mortgage debt. * * * In theory, as between the purchaser and the original mortgagor, the mortgagor has already advanced to the purchaser the amount of the mortgage debt by receiving that much less than the market value of his land at the time of the sale. In other words, it is presumed that the purchaser of land subject to a mortgage deducted the amount of the incombrance [sic] from the market value of the land when he bought. The mortgagor therefore has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land, go out and acquire the mortgage, and enforce the same against the mortgagor personally. [*Bd of Trustees, supra* quoting *Wright v Anderson*, 62 SD 444, 449-450; 253 NW 484 (1935).]

The *Bd of Trustees* Court went on to set forth the priority of a claim involving more than one mortgage:

The price at a foreclosure sale on a second mortgage is depressed to reflect the outstanding first mortgage. A third party who purchases the property at the foreclosure sale on the second mortgage would have to satisfy the debt secured by the first mortgage in order to prevent the mortgagee of the first mortgage from asserting a superior claim to the property. [*Id.* at 325-326.⁶]

Therefore, defendant’s challenge to the priority of the first mortgage acquired by plaintiff is without merit.

Nonetheless, defendant alleges that she was entitled to redeem the property based on the equitable right of redemption. The equitable right of redemption is governed by MCL 600.5744(6) and provides:

⁶ In *Bd of Trustees, supra*, the Court refused to apply equitable principles where the plaintiff attempted to avoid a merger of interests to obtain double recovery. Indeed, in the present case, one could argue that defendant sought to purchase the junior mortgage at a depressed price and obtain the superior position of the first mortgage without purchasing that interest. Equity will not permit such a situation.

When a judgment for possession is for nonpayment of money due under a tenancy or for nonpayment of moneys required to be paid under or any other material breach of an executory contract for purchase of the premises, the writ of restitution shall not issue if, within the time provided, the amount as stated in the judgment, together with the taxed costs, is paid to the plaintiff and other material breaches of an executory contract for purchase of the premises are cured.

“The right to redeem from a foreclosure at law is a legal right, is created by the statute, and can neither be enlarged nor abridged by courts.” *Wood v Button*, 205 Mich 692, 703; 172 NW 422 (1919). If the right to redeem is paid to the proper person at the proper time, the redemption is complete. *Id.* When a redemption is not executed within the statutory period, the courts will exercise their equitable power only in unusual circumstances. *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996). Fraud is an unusual circumstance that may warrant deviation from the rule. *Id.*

In the present case, the trial court held that unusual circumstances were not present to justify an extension of the redemption period. We agree. Defendant’s documentary evidence indicates that she was engaged in a business transaction, had conducted research, and was aware of the presence of other mortgage foreclosure sales that would be transpiring. Defendant was present for the sale of the senior mortgage to plaintiff. Defendant was well aware that she was purchasing the property, not as a residence, but simply for business purposes. There is no indication that she attempted to obtain the financing prior to the sale of the senior mortgage. After a dispute regarding ownership of the contents involving the property owner, defendant did not seek court intervention, but testified in her deposition that she went to the home on two more occasions. Defendant acknowledged in her deposition that, for selling purposes, a furnished home was more likely to sell than an unfurnished home. Nonetheless, she continued to allow her two business partners to remove the furnishings and appliances. When asked in deposition about the removal of major appliances, defendant could not recall what was in the home and where it went, but rather, placed any blame for removal of furnishings on her business partners. Curiously, when defendant was asked about the presence of individual large appliances present in the home, she could not recall any details. However, defendant did recall that the washer was present and moved to the garage when asked about her confrontation with the property owner who appeared on the premises on April 30, 2004.

The *Flynn* Court noted that the equitable right of redemption is to be extended only in unusual circumstances such as fraud. There is no indication that the equitable right of redemption should be applied when one is utilizing the doctrine as leverage in a business transaction. Under the circumstances, the trial court’s disposition of the cross motions for summary disposition was proper.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello